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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re LIANA S. et al.,

Persons Coming Under the Juvenile
Court Law.

B173919

(Los Angeles County
Super. Ct. No. CK53091)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

ELIZA A. et al.,

Defendants and Appellants.

APPEALS from orders of the Superior Court of Los Angeles County, Stephen Marpet, Temporary Judge (pursuant to Cal. Const., art. VI, § 21). Affirmed in part and dismissed in part.

Lori A. Fields, under appointment by the Court of Appeal, for Defendant and Appellant Eliza A.

Mark A. Massey, under appointment by the Court of Appeal, for Defendant and Appellant George S.

Office of the County Counsel, Larry Cory, Assistant County Counsel, and Frank DaVanzo, Principal Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Eliza A. and George S.¹ appeal from an order dated May 11, 2004, in which the juvenile court sustained the allegations of petitions filed under Welfare and Institutions Code section 300² and declared their minor children to be dependent children of the court.³ They challenge the sufficiency of the evidence supporting the court's jurisdictional determinations. We reject these challenges and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

The Department of Children and Family Services (DCFS) filed the first section 300 petition in this case on August 5, 2003. The petition alleged five-year-old Liana S., four-year-old Sonia S., and two-year-old Leslie A. were in danger of serious physical harm (subd. (a)), in that they were living with their maternal grandparents, who had a history of domestic violence. Further, the children's mother, Eliza A., failed to protect the children (subd. (b)), due to her history of substance abuse and her placement of the

¹ George S. also is identified as Jorge S.

² All future section references are to the Welfare and Institutions Code.

³ Eliza also purports to appeal from a May 8, 2004 order, and George purports to appeal from a May 5, 2004 order. There is no May 5 order. The May 8 order did not contain the challenged adjudications. Accordingly, we will dismiss the appeals as to these two orders.

children in the home of their maternal grandparents, in which domestic violence occurred and which was unsanitary and hazardous.

The petition identified George S. as Liana and Sonia's alleged father and noted that he was in jail at the time. The petition alleged Leslie's father was named Anthony; his whereabouts were unknown and he had failed to provide for his daughter (§ 300, subds. (b), (g)).

According to the detention report, DCFS received referrals on Eliza and her sister, who lived in the same home with the maternal grandparents. The maternal aunt had given birth to a child who had been exposed to drugs. Eliza had been observed using drugs and had sores on her legs common to methamphetamine users, but she denied current drug use. Eliza was six months pregnant; she was not receiving prenatal care. The maternal grandparents fought with one another. The maternal grandfather had been in and out of jail for drug use and trafficking and currently had a warrant out for his arrest. The house was dirty and unsanitary, with hazardous chemicals within the children's reach. The children were detained and placed in foster care.

On August 8, 2003, the juvenile court found a prima facie case for detention. It found George to be the alleged father of Liana and Sonia.

DCFS filed a first amended section 300 petition on September 12, 2003. This petition added an allegation that George was incarcerated in Georgia for drug trafficking and had a lengthy criminal record. (§ 300, subd. (b).)

According to a jurisdiction/disposition report of the same date, George claimed that all three children and the baby Eliza was expecting were his. Leslie did not have his last name because he and Eliza were mad at each other when Leslie was born. He did not know that Eliza was using drugs. He wanted to get custody of his children when he was released from jail.

Additionally, Eliza tested positive for methamphetamines and amphetamines on July 31, 2003. The children stated that Eliza had spanked Sonia and Leslie with a belt. Eliza stated that she had not been living with George but saw him on a daily basis prior to his arrest in April 2003. She denied that George was Leslie's father.

The Children's Social Worker (CSW) provided an additional report stating that Leslie's foster mother had informed her on September 11, 2003 that Leslie had been masturbating. She demonstrated this by lifting her dress, putting her hand beneath her underwear and stating, "My daddy does this to me." DCFS was investigating this matter.

The juvenile court continued the matter. On October 14, 2003, DCFS filed a second amended petition. This petition added allegations that George sexually abused the children and Eliza failed to protect them from sexual abuse. (§ 300, subds. (b), (c), (d).) It also added allegations of cruelty based upon Anthony's failure to provide for Leslie. (§ 300, subd. (b).)

In an October 14, 2003 report, the CSW stated that the children had been examined for sexual abuse. Leslie's examination was within normal limits. Leslie told her foster mother that her father put his fingers and a "stick" in her vaginal area on several occasions. Sonia said that she saw her father touch Leslie and saw Leslie bleeding from her vaginal area.

The CSW then interviewed the children separately. Leslie indicated that George touched her "cola," meaning her vaginal area. She demonstrated by lifting her blouse, putting her hand inside her underwear and rubbing her vaginal area. She said she also saw George do this to Sonia. Sonia told the CSW that George touched her "cola." He also touched Liana's and Leslie's "colas." When Sonia told her mother about it, her mother told her to go to the restroom. Liana denied that George touched her or her sisters, insisting that she protected her sisters.

The parties attempted to reach an agreement as to the allegations of the petition through mediation. DCFS filed a third amended section 300 petition on October 21, 2003. This petition deleted allegations regarding domestic violence in the maternal grandparents' home and the allegation of cruelty based upon Anthony's failure to provide for Leslie. It added allegations as to Eliza's use of inappropriate physical discipline, and George's failure to protect the children from this discipline. (§ 300, subd. (a), (b).) The juvenile court set the matter for mediation on November 18 and adjudication on December 3.

After Eliza had her baby, DCFS filed a section 300 petition as to the baby, Estella A. The allegations of the petition were the same as those of her siblings' petition. The juvenile court found a prima facie case for detention.

At the November 18, 2003 mediation, Eliza agreed to the language in portions of the petition but not others. The case therefore was set for adjudication of the remaining allegations.

In a report prepared for the December 3, 2003 adjudication, the CSW noted that Eliza had tested positive for drugs twice during her pregnancy, she had missed several drug tests and she had tested positive for methamphetamines and amphetamines on November 19. It was unclear whether she was in a drug treatment program. She had missed scheduled visitation with the children and failed to call to cancel. The court continued the adjudication, however, to allow George to review the amendments to the petition and to allow the older children to be brought to court to testify.

DCFS filed a fourth amended petition on Liana, Sonia and Leslie and a first amended petition on Estella on January 5, 2004. The petitions alleged that Eliza used inappropriate physical discipline, including using a belt, against Liana, Sonia and Leslie, placing them at risk of physical and emotional harm. (§ 300, subd. (a).)

The petitions further alleged a risk of serious physical harm or illness due to the parents' inability to care and supervise them and provide them with adequate food, clothing, shelter and medical treatment (§ 300, subd. (b).) Specifically, Eliza had a history of substance abuse and had recently tested positive for methamphetamines. Eliza placed Liana, Sonia and Leslie in a home in which their maternal grandfather used drugs and household chemicals were left in areas in which the children had access to them. Eliza exposed the children to a violent altercation between her and the maternal aunt. She also used inappropriate physical discipline on the children. George was incarcerated and had a lengthy criminal record. He sexually abused Leslie by putting his hand and a stick in her vaginal area.

The petitions alleged the children were suffering or had a substantial risk of suffering serious emotional damage (§ 300, subd. (c)) due to the sexual abuse by George.

They alleged this risk also was due to Eliza's acts of cruelty and emotional abuse of Liana, consisting of Eliza forcing Liana to eat Eliza's feces as a form of discipline. George's acts also constituted sexual abuse. (*Id.*, subd. (d).) Eliza's acts constituted cruelty (*id.*, subd. (i)) and abuse of a sibling (*id.*, subd. (j)). Finally, the petitions alleged George was incarcerated and left the children with no provision for support. (*Id.*, subd. (g).)

According to the accompanying report, Liana's foster mother smelled a foul odor in Liana's bedroom. She saw Liana in bed with something black smeared on her face. She pulled back the sheets and observed feces in the bed. She questioned Liana, who said she was mad at herself. She believed that when Liana went to the restroom at night, Liana was eating her feces. Liana later revealed that when Eliza was upset with her, Eliza would make Liana take Eliza's feces out of the toilet and eat them. Sonia and Leslie said that Liana would make them eat her feces. Sonia had been soiling her underwear accidentally and stated that she was afraid she would be forced to eat people's feces.

The CSW interviewed Liana. Liana said she had an accident; she "pooped in the bed." She ate the "poop" because she was mad at herself. When asked whether she had eaten "poop" before, she said she had, "[a]t mommy's home. Mommy would take me to the restroom and make me eat poop." It was her mother's "poop" that she ate. When asked why her mother would do this, she said, "when I would fight with my sisters my mother took me to the restroom and told me to eat her poop." She added that after she had the accident in bed, her foster mother told her everyone has accidents. She would not eat her "poop" again and would not tell her sister to eat "poop."

The hearing was continued to February 5, 2004. In the report prepared for the hearing, the CSW reported that Eliza said she was not attending individual counseling, in that it was not court-ordered. She claimed to have completed parenting classes. She said she was not attending drug counseling, because she did not have the initial fee. The CSW reported that Eliza had failed to drug test on numerous occasions. Eliza had one negative

drug test on December 4, 2003. As to George, the CSW reported he had failed to keep in regular contact, despite being left a message that he could call the CSW collect.

On February 5, 2004, the hearing was continued again, after the children's counsel declared a conflict of interest. For the continued hearing, the CSW reported Eliza still was not random drug testing, and she had tested positive for methamphetamines and amphetamines on February 13. Eliza had entered a drug program but had failed to attend a recent session or to call the program. Eliza had failed to attend or cancel scheduled visitation.

The foster mother had not observed any other episodes of Liana eating her feces or of Leslie masturbating. Sonia, however, had been having episodes of depression when Eliza failed to show up for visitation.

The hearing began on March 8, 2004. The juvenile court admitted documentary evidence. The CSW and the foster mother for the three older girls testified. The hearing continued on March 11. The CSW concluded her testimony. Liana testified, and Eliza testified.

The foster mother testified that within a month of the three older girls arriving in her home, she observed Leslie rubbing or touching her vaginal area. She told Leslie not to touch herself there, that she could hurt herself. This occurred a number of times. The foster mother finally asked Leslie why she did that. Leslie pulled up her dress, put her hand in her underwear, touched her vagina and stated, "George touched me there." The foster mother asked who George was, and Leslie said he was her daddy. At a later time, the foster mother told Leslie no one should touch her private parts. Leslie continued "playing with herself." The foster mother kept an eye on Leslie and even put socks on her hands to stop the behavior. Eventually, she told Leslie, "If you ever feel like touching yourself, you come to me and we will talk about it, and I will hold you. You don't need to do that." After that, Leslie stopped touching herself.

On a later occasion, when the foster mother was dressing the girls for school, Sonia told her, "I saw when George touched Leslie, and I saw blood." The foster mother

asked Liana if she knew anything about George touching Leslie. Liana said she did not know; she never saw anything.

The foster mother also testified about finding Liana in bed with feces around her mouth. She asked Liana if she had “pooped” in her pants. Liana said she had. The foster mother asked why, and Liana said she was mad at herself. When the foster mother said that there was stuff everywhere, including on Liana’s hands and mouth, Liana said that she had eaten her “poop.” The foster mother asked, “Why would you do that?” Liana started to cry and explained that her mother would sometimes make her eat “poop” when she would get mad. A couple of weeks later, Liana said that when she got in trouble, her mother would make her eat “poop.” She would have to go to the toilet, get “poop” and eat it.

The foster mother asked Sonia and Leslie if their mother ever made them eat “poop.” They said no. Liana told the foster mother that her sisters did not have to do that.

Liana testified regarding Leslie, “My dad was touching her in her private part.” This happened at night when Liana and Leslie were in the bedroom watching a dinosaur movie on television. Her dad came into the room, went to Leslie and touched her private part. Leslie cried. Her dad then left the room. Liana went over to Leslie, kissed her on her cheek, and said, “Don’t worry. I will take care of you.”

Liana was asked if, while living with her mother, there was ever a time she had an accident and “pooped” in her pants. She said there was, and when it happened, “My mom made me . . . eat poop.” This happened just one time. That time, and the time her foster mother saw her eating “poop,” were the only two times it happened.

Eliza testified that George was the father of Liana, Sonia and Estella, but not of Leslie. He never lived with her and the children, but he would visit. He never took the children for overnight or weekend visits. He sometimes took them to his mother, so she could babysit them. He sometimes took care of the children, when Eliza’s sister was unable to do so. None of the children told her that George touched Leslie.

Eliza denied that Liana ever accidentally defecated in her pants. She denied that she ever made Liana eat feces.

Following the hearing, the juvenile court sustained the petitions. The court adjudged Liana to be a dependent child of the court under subdivisions (a), (b), (c), (d), (g), (i) and (j) of section 300. It adjudged Sonia and Leslie to be dependent children of the court under subdivisions (a), (b), (g) and (j) of section 300. It adjudged Estella to be a dependent child of the court under subdivisions (a), (b) and (j) of section 300.

CONTENTIONS

Eliza contends the juvenile court improperly asserted jurisdiction of the children under subdivisions (c), (i) and (j) of section 300 based on the incident with the feces, in that the record shows that even if the incident did occur, (1) it was an isolated incident; (2) there was no evidence that similar incidents would occur in the future or that the children were currently subject to a defined risk of harm; and (3) there was no evidence that any of the children were suffering serious emotional harm as a result of the incident. We disagree.

George contends there is no substantial evidence to support the juvenile court's jurisdictional finding that he sexually abused Leslie. Again, we disagree.

George further contends the juvenile court abused its discretion in denying him reunification services, in that he is the children's presumed father. We find this contention to be waived.

DISCUSSION

Eliza

The juvenile court's jurisdictional findings must be supported by a preponderance of the evidence. (§ 355; *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 248.) We review the court's findings under the substantial evidence test. (*In re Heather A.* (1996)

52 Cal.App.4th 183, 193; *In re Matthew S.* (1996) 41 Cal.App.4th 1311, 1318-1319.) We will uphold the findings if they are supported by credible evidence of solid value. (*Matthew S.*, *supra*, at p. 1319.) In determining whether substantial evidence supports the findings, we view the evidence in the light most favorable to the findings, drawing all reasonable inferences in support of the findings. (*Heather A.*, *supra*, at p. 193; *In re Tania S.* (1992) 5 Cal.App.4th 728, 733.)

Eliza argues that “even if the incident regarding mother forcing Liana to eat feces is true, Liana testified that this was a one-time incident that occurred one year earlier, and she was found to be credible at the adjudication hearing. There was no evidence that Liana had been subjected to this behavior again in the intervening year.” (Fn. omitted.) Since it was a one-time incident, Eliza argues, there is no substantial evidence of any present risk to the children. (§ 300, subd. (c).) She further argues that there is no evidence the children were suffering serious emotional harm as a result of the incident (*ibid.*), they were subjected to an act of cruelty (*id.*, subd. (i)), or that Sonia, Leslie or Estella would be similarly abused (*id.*, subd. (j)).

In making jurisdictional findings, the question before the juvenile court is whether the current circumstances subject the child to the risk of harm specified in section 300. (*In re Janet T.* (2001) 93 Cal.App.4th 377, 388; *In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.) Although “evidence of past conduct may be probative of current conditions,” past conduct, standing alone, is not enough to support jurisdictional findings. (*Rocco M.*, *supra*, at p. 824; accord, *Janet T.*, *supra*, at p. 388.) The court must have some reason to believe such conduct is likely to continue in the future. (*Janet T.*, *supra*, at p. 388; *Rocco M.*, *supra*, at p. 824.) Hence, evidence of a single past incident may not be sufficient to support jurisdictional findings. (See *In re Alysha S.* (1996) 51 Cal.App.4th 393, 399.)

We disagree with Eliza’s characterization of the evidence in the instant case as showing a one-time incident in which Eliza forced Liana to eat feces. When testifying, Liana was asked only about an incident in which she accidentally defecated in her pants. She testified that this occurred one time, and Eliza then forced her to eat the feces. Liana told her foster mother, however, that when Eliza was mad, or when Liana got in trouble,

she would have to eat feces. Eliza made her go to the toilet, get feces and eat them. Similarly, Liana told the CSW that when she would fight with her sisters, Eliza would take her to the restroom and make her eat Eliza's feces. This evidence points to recurrent conduct, not a one-time incident.

Inasmuch as there was recurrent conduct, which Eliza denied and had not received help in addressing, there was a risk that it would continue. (See *In re Brison C.* (2000) 81 Cal.App.4th 1373, 1381 [no risk of danger to child where parents recognized the inappropriateness of their behavior and expressed a willingness to attend counseling and parenting classes in order to change their behavior].) There was evidence that Liana already was "suffering serious emotional damage" (§ 300, subd. (c)) as a result of Eliza's conduct. Liana was eating her own feces to punish herself when she did something she thought was wrong. (*Ibid.* ["serious emotional damage" evidenced by "untoward aggressive behavior toward self"]; see *In re Brison C.*, *supra*, at pp. 1379-1380 [no evidence of serious emotional damage where the child easily adapted to foster care and exhibited no behavioral abnormalities].)

That Eliza had forced only Liana to eat feces does not preclude a finding that Sonia, Leslie and Estella also were at risk. "[A]n abusive parent's risk of recidivism is not necessarily limited to a child who was the parent's previous victim. The parent may very well pose a serious threat to his or her other children." (*Deborah S. v. Superior Court* (1996) 43 Cal.App.4th 741, 751.) There is nothing in the circumstances surrounding Eliza's conduct toward Liana to suggest that it could not be directed at the other children. If Liana was forced to eat feces when Eliza got mad or when Liana misbehaved, there was no reason why Eliza would not force Sonia, Leslie or Estella to eat feces if they misbehaved and Eliza got mad. The juvenile court therefore appropriately found they were at risk of harm as well. (§ 300, subd. (j); *In re Joshua J.* (1995) 39 Cal.App.4th 984, 994-995.)

Forcing Liana to eat feces constituted cruelty within the meaning of subdivision (i) of section 300. Eliza quotes the definition of "cruelty" found in Black's Law Dictionary (5th ed. 1979) at page 340: "The intentional and malicious infliction of physical or

mental suffering upon living creatures, particularly human beings” and “the wanton, malicious, and unnecessary infliction of pain upon the body, or the feelings and emotions; abusive treatment; inhumanity; outrage.” Eliza asserts that while forcing Liana to eat feces “is repugnant to normal sensibilities,” there is no evidence Liana suffered great physical or mental suffering as a result of it. The conduct therefore was not cruel, Eliza claims.

In our view, forcing a young child to eat feces as punishment for misbehavior does constitute a malicious and unnecessary infliction of physical or mental suffering on the child. It is abusive, inhumane and outrageous. It constitutes cruelty. Moreover, it did cause Liana great mental suffering, since, as a result, Liana continued to punish herself in this manner for what she perceived as misbehavior.

George

George first contends there is no substantial evidence supporting the juvenile court’s finding that he sexually abused Leslie. He suggests that, when faced with her foster mother’s “relentless chastising” over her masturbating, Leslie excused her masturbating by blaming George. He points out that Liana and Sonia were inconsistent in their statements about sexual abuse, and that the sexual abuse examination could not confirm that any of the girls had been sexually abused. He also points out that he may have put his hand down Leslie’s diaper to check for wetness, but parents regularly do that to check for wetness, and it does not constitute sexual abuse. Finally, he suggests that Liana and Sonia might have lied to get attention.

We review the juvenile court’s findings under the substantial evidence rule. (*In re Heather A.*, *supra*, 52 Cal.App.4th at p. 193; *In re Joel H.* (1993) 19 Cal.App.4th 1185, 1203.) In determining whether substantial evidence supports the findings, we view the evidence in the light most favorable to the findings, noting that questions of fact and credibility are the exclusive province of the juvenile court. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319; *In re Ricardo L.* (2003) 109 Cal.App.4th 552, 564.) We do not

reweigh the evidence or exercise our independent judgment. (*In re Ricardo L.*, *supra*, at p. 564; *In re Matthew S.* (1988) 201 Cal.App.3d 315, 321.)

There is ample evidence in the record to support the juvenile court's finding that George sexually abused Leslie. Leslie consistently stated that George touched her vagina. She even demonstrated what he did by rubbing her vagina, not merely by putting her hand into her underwear. Sonia said that she saw George touch Leslie's vagina. Liana testified that she saw George touch Leslie's vagina. The juvenile court was entitled to accord credibility to the girls' statements, even if Sonia and Liana at times gave contradictory statements and there was no physical evidence to support the girls' statements. We cannot reject the court's determination as to credibility unless the girls' testimony was unbelievable per se or physically impossible. (*Evje v. City Title Ins. Co.* (1953) 120 Cal.App.2d 488, 492.) It was not.

Moreover, there was no evidence that Leslie made up a story about George touching her in order to excuse her masturbation, or even that she was capable of doing so. There was no evidence that George touched her vaginal area accidentally while sticking his hand in Leslie's diaper to determine whether the diaper was wet. There was no evidence that Liana and Sonia lied in order to get attention. These explanations for the girls' statements are pure speculation.

In sum, there is substantial evidence supporting the juvenile court's finding of sexual abuse. We have no basis for overturning this finding. (*In re Stephanie M.*, *supra*, 7 Cal.4th at pp. 318-319; *In re Ricardo L.*, *supra*, 109 Cal.App.4th at p. 564.)

George also claims the juvenile court abused its discretion in denying him reunification services, in that he is the children's presumed father. The court found at the detention hearing that George was the alleged father of Liana and Sonia. At the jurisdictional hearing, the court denied reunification services to George on the ground he was an alleged father, not a presumed father. (§ 361.5, subd. (a).)

George acknowledges that he never requested that the juvenile court make a finding of paternity and grant him reunification services. (See *In re Jesusa V.* (2004) 32 Cal.4th 588, 595-596.) As a general rule, a party "cannot successfully complain because

the trial court failed to do something which it was not asked to do,” nor can an order be reversed for the court’s failure to grant relief not requested. (*In re Cheryl E.* (1984) 161 Cal.App.3d 587, 603; accord, *Dimmick v. Dimmick* (1962) 58 Cal.2d 417, 422-423.)

George points out that, “even if a waiver occurred, we may, at our discretion, hear issues the party has waived, particularly when the parties have already briefed them.” (*In re C. T.* (2002) 100 Cal.App.4th 101, 110, fn. 7.) However, while “[a]n appellate court may in its discretion consider an issue not properly raised in the trial court if the issue presents a pure question of law on undisputed evidence” (*Cabrera v. Plager* (1987) 195 Cal.App.3d 606, 611; accord, *Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *Hennefer v. Butcher* (1986) 182 Cal.App.3d 492, 505-506), “it is not appropriate to do so by exercising a discretion and making factual decisions to which the trial court has never addressed itself” (*Rutan v. Summit Sports, Inc.* (1985) 173 Cal.App.3d 965, 974). For this reason, we decline to address the factual issue of George’s status as a presumed father on appeal.⁴

⁴ If George wishes a declaration of paternity and a grant of reunification services, he should make an appropriate motion below through his attorney.

The May 11, 2004 order is affirmed. The purported appeals from the May 5 and May 8, 2004 orders are dismissed.

NOT TO BE PUBLISHED

SPENCER, P.J.

I concur:

SUZUKAWA, J.^{*}

I concur in the judgment only:

VOGEL, J.

^{*} Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.